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The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud

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The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud

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I. INTRODUCTION

Since The Americans with Disabilities Act of 1990 (ADA)¹ took effect, employers have struggled when trying to apply the act to real employment situations. Originally, federal protection against handicap discrimination was established in the Rehabilitation Act of 1973,² which prohibits discrimination on the basis of handicap with regard to any program or activity receiving federal assistance.³ Precedent arising from cases decided under the Rehabilitation Act have served as guidance for ADA determinations. As ADA case law becomes more developed, however, courts are relying less on the Rehabilitation Act case law. In enacting the ADA, Congress specifically required that the

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1. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (The employment provisions of the ADA became effective on July 26, 1992).

2. 29 U.S.C. §§ 701-797b (1994).

3. See *Maddox v. University of Tennessee*, 62 F.3d 843, 846 (6th Cir. 1995).

Equal Employment Opportunity Commission (EEOC) issue regulations expanding on the legislation.⁴ In addition, the EEOC has drafted an appendix to the regulations which serves as the agency's interpretive guide to the ADA.⁵ The regulations and interpretive guidance are given considerable weight unless they are contrary to the plain meaning of the statute.⁶

One of the most difficult questions under the ADA has been the definition of what constitutes a reasonable accommodation. Further, the more perplexing question for parties addressing any accommodation issue may be what the employer and employee's duties are with regard to how each must work with the other in an effort to determine whether a reasonable accommodation can be provided. This Article will explore the employer and employee's duties to participate in an interactive process in an effort to determine whether a reasonable accommodation can be provided.

II. ADA BASICS

The ADA, makes it illegal for an employer, employment agency, labor organization, or joint labor-management committee to discriminate against a "qualified individual with a disability."⁷ The ADA requirements apply to employers who employ 15 or more employees.⁸ The ADA protects a "qualified individual with a disability" in all aspects of employment.⁹ "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹⁰ Under the ADA, disability is defined in one of three ways: "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."¹¹

Major life activities are defined as,

those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing,

4. See 42 U.S.C. § 12116 (1994); see also 19 C.F.R. §§ 1630.1-16 (1997).

5. See 29 C.F.R. pt. 1630 app. (1997)(Interpretive Guidance on Title I of the Americans with Disabilities Act).

6. See *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

7. See 42 U.S.C. § 12111(2) (1994).

8. See 42 U.S.C. § 12111(5)(A) (1994).

9. See 42 U.S.C. § 12112(a) (1994).

10. 42 U.S.C. § 12111(8) (1994).

11. 42 U.S.C. § 12102(2) (1994).

learning, and working. . . . Other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching.¹²

The term *substantially limits* means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.¹³

The regulations further state:

The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.¹⁴

To state a *prima facie* case of disability discrimination under the ADA, a plaintiff must establish three elements: (1) that he or she is a disabled person within the meaning of the ADA; (2) that he or she is a qualified individual with a disability; and (3) that the employer took adverse action against the plaintiff because of his or her disability.¹⁵

III. REASONABLE ACCOMMODATION

An accommodation refers to an employer's obligation to consider changes in its ordinary work rules, facilities, terms, and conditions of employment to enable a disabled individual to work.¹⁶ Pursuant to the administrative regulations,

a reasonable accommodation may include but is not limited to: (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.¹⁷

This is a very broad list of potential accommodations which an employer may be required to consider as reasonable accommodations to known physical or mental limitations of qualified individuals with disabilities.

The ADA requires an employer to accommodate the known physical and mental "limitations" of an otherwise qualified individual with

12. 29 C.F.R. pt. 1630 app. § 1630.2(i) (1997); *see also* Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1101-02 (S.D. Ga. 1995).

13. 29 C.F.R. § 1630.2(j)(1) (1997).

14. 29 C.F.R. § 1630.2(j)(2) (1997).

15. *See* Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995); Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 212 (4th Cir. 1994).

16. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995), *aff'd*, 44 F.3d 538 (7th Cir. 1995).

17. 29 C.F.R. § 1630.2(o)(2) (1997).

a disability.¹⁸ This means that knowledge of the "limitations" caused by the disability is required before the employer's duty to accommodate arises. An employer can have knowledge of an individual's disability and not know that there are limitations caused by the disability.

*Taylor v. Principal Financial Group, Inc.*¹⁹ provides guidance related to how employer knowledge can arise.

Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations. . . . When the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation.²⁰

Taylor seems to indicate that the employer can never have the initial burden of identifying the need for, and suggesting, an appropriate accommodation unless an employee's disability, and resulting limitations, are open, obvious, and apparent to the employer. This generally means that the employee has the initial burden of informing the employer of his or her limitations and requesting an accommodation. However, "the employee need not mention the ADA or even the term 'accommodation.'"²¹ An exception to the general rule exists in the case of individuals with severe mental illnesses who are unable to articulate the need for an accommodation. An employer must "meet the employee half-way"²² in order to determine the appropriate accommodation in these cases. This could include approaching the employee to determine if an accommodation is necessary.²³ Unlawful discrimination occurs if an employer fails to provide a reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability unless it can be demonstrated that the proposed accommodation would impose an undue hardship on the employer's business.²⁴ A plaintiff has the burden of showing that a reasonable accommodation is possible and that he or she is qualified for the position if the reasonable accommodation is provided. If the plaintiff establishes that a reasonable accommodation is possible, the employer bears the burden of establishing that the reasonable accommodation would impose an undue hardship.²⁵

18. See 42 U.S.C. § 12112(b)(5)(A) (1994).

19. 93 F.3d 155 (5th Cir. 1996).

20. *Id.* at 165.

21. *Schmidt v. Safeway Inc.*, 864 F. Supp 991, 997 (D. Or. 1994).

22. *Bultemeyer v. Fort Wayne Comm. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996).

23. See *id.*

24. See 42 U.S.C. § 12112(b)(5)(A) (1994).

25. See *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996).

Though 29 C.F.R. section 1630.2(o)(3) states that it may be necessary for the employer to initiate an informal, interactive process with the employee,²⁶ the administrative regulations say that an appropriate reasonable accommodation is best determined when both the employer and the employee participate in a flexible and interactive process.²⁷ ADA Interpretive Guidance section 1630.9 reads in pertinent part as follows:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer . . . should: (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.²⁸

It should be noted that liability for failing to provide a reasonable accommodation ensues only when the employer bears responsibility for the interactive process breakdown.²⁹ When determining if an employer's decision not to offer an accommodation was reasonable, the standard of reasonableness does not mean only the employer's opinion. Rather, "the determination of reasonableness is an objective analysis."³⁰ Reasonableness will "depend on a good-faith effort to assess the employee's needs and respond to them."³¹

Other general information related to an employer's duty to accommodate includes: (1) The employer may choose between one or more effective accommodations, including choosing a less expensive accommodation that is easier for it to provide;³² (2) If an employee fails to

26. See 29 C.F.R. § 1630.2(o)(3) (1997).

27. See 29 C.F.R. pt. 1630 app. (1997)(Interpretive Guidance on Title I of the Americans with Disabilities Act).

28. 29 C.F.R. pt. 1630 app., § 1630.9 (1997)(Process of Determining the Appropriate Reasonable Accommodation). The approach set forth in the administrative guidance has been recognized and approved by several circuits. See *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155 (5th Cir. 1996); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996); *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995).

29. See *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135-1137 (7th Cir. 1996).

30. *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 350 (4th Cir. 1996), *cert. denied, sub nom. Williams v. Avnet, Inc.*, 117 S. Ct. 1844 (1997).

31. *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996).

32. See *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996). Under the ADA, the choice of what type of accommodation to make is the employer's so long as the accommodation accomplishes the goals of enabling the employee to perform the essential functions of the job and providing the employee with the same prerequisites of employment as are granted to other employees. See *Vande Zande v. Wis.*

identify an accommodation when asked, that employee will have a more difficult time contending that the employer failed in its accommodation obligation;³³ (3) If the employee refuses a reasonable accommodation, the employer may be relieved of its accommodation obligation;³⁴ and (4) If an employee fails to provide required medical support for an accommodation on request, the request for accommodation may be denied.³⁵

IV. THE INTERACTIVE PROCESS

The ADA Interpretive Guidance section 1630.9 reads in pertinent part as follows:

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. . . . When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should: (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.³⁶

The approach set forth in the administrative interpretive guidance has been recognized and approved by several circuits.³⁷ Some courts have argued that since 29 C.F.R. section 1630.2(o)(3) specifies that "[t]o determine the appropriate reasonable accommodation it *may* be necessary for the covered entity to initiate an informal, interactive

Dep't of Admin., 851 F. Supp. 353, 360 (W.D. Wis. 1994). In *Stolmeier v. Yellow Freight System, Inc.*, 64 Empl. Prac. Dec. (CCH) ¶ 42, 957 (D. Or. 1994), the court held that a company reasonably accommodated a truck driver by providing a back support pillow, even though the employee had requested a more expensive special seat and power steering, where there was no evidence that the additional accommodations were medically necessary.

33. See *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

34. See 29 C.F.R. § 1630.9(d) (1997). In *Ellis v. Ford Motor Co.*, 79 F.3d 1148 (6th Cir. 1996), Ford was not required to provide Ellis with a job after Ellis continually refused numerous positions he could have performed despite his medical conditions.

35. See *Derbis v. U.S. Shoe Corp.*, 63 USLW 2259 (D. Md. 1994), *aff'd in part*, 67 F.3d 294 (4th Cir. 1995).

36. 29 C.F.R. pt. 1630 app. § 1630.9 (1997)(Process of Determining Appropriate Reasonable Accommodation).

37. See *e.g.*, *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155 (5th Cir. 1996); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996).

process with the qualified individual,"³⁸ that employers are not required to engage in an interactive process.³⁹ The Eleventh Circuit seems to be of the opinion that only in some limited circumstances does the ADA require an employer to engage in an interactive process.⁴⁰ Many courts, however, have indicated that once an accommodation is properly requested the employer has an obligation to participate in the interactive process.⁴¹ In *Beck v. University of Wisconsin Board of Regents*,⁴² the Seventh Circuit stated that "[o]nce an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary."⁴³ The court in *Beck* further indicated that "the employer has at least some responsibility in determining the necessary accommodation."⁴⁴ It should also be noted that while *Beck* discussed the issue of the informal interactive process in the context of the ADA, the Third Circuit in *Mengine v. Runyon*,⁴⁵ followed *Beck* in its analysis of a claim brought pursuant to the Rehabilitation Act.⁴⁶ It seems that the best approach for an employer may be to participate in an interactive process and not to rely on 29 C.F.R. 1630.2(o)(3) which only indicates that participation in the interactive process may be necessary.⁴⁷

A better approach for the employer may be to treat the interactive process as a requirement that imposes an obligation to do what is reasonable under the circumstances. ADA Interpretive Guidance section 1630.9 indicates that in many instances, the appropriate reasonable accommodation may be so obvious that it may not be necessary to proceed in a step-by-step fashion.⁴⁸ An example is offered where an employee who uses a wheelchair requests that his desk be placed on

38. 29 C.F.R. § 1630.2(o)(3) (1997)(emphasis added).

39. See *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995); *Staub v. Boeing Co.*, 919 F. Supp. 366, 370 (W.D. Wash. 1996).

40. See *Willis v. Conopco, Inc.*, 108 F.3d 282, 285-86 (11th Cir. 1997); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286-87 (11th Cir. 1997); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447-48 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 964 (1997).

41. See *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135, 1137 (7th Cir. 1996); *Gerdess v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386, 1404-05 (N.D. Iowa 1996), *aff'd*, 125 F.3d 634 (8th Cir. 1997); *Sieberns v. Wal-Mart Stores, Inc.*, 946 F. Supp. 664, 668-71 (N.D. Ind. 1996), *aff'd*, 125 F.3d 1019 (7th Cir. 1997).

42. 75 F.3d 1130 (7th Cir. 1996).

43. *Id.* at 1137.

44. *Id.* at 1135.

45. 114 F.3d 415 (3rd Cir. 1997).

46. See *id.* at 419-20.

47. See 29 C.F.R. § 1630.2(o)(3) (1997).

48. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997)(Process of Determining the Appropriate Reasonable Accommodation).

blocks in order that the arms of the wheelchair will fit under the desk. The Interpretive Guidance suggests that in this case an appropriate accommodation has been requested and identified without the employee or employer engaging in any sort of reasonable accommodation process.⁴⁹ The Interpretive Guidance goes on to state in pertinent part as follows:

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described.⁵⁰

It seems that a fair interpretation of the employer's duty may be that once an employee has made a proper request for an accommodation, an employer has a duty to participate in an interactive process in an effort to identify a reasonable accommodation. Furthermore, the extent of the employer's required participation in an interactive process is probably defined on a case-by-case basis. The Eleventh Circuit has expressed that only under limited circumstances does the ADA require an employer to engage in an interactive process.⁵¹ The Eleventh Circuit has also stated "we are confident that although the ADA does not mandate a pretermination investigation, the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake an investigation before terminating an employee."⁵² Clearly, it follows that it would be wise for any employer to engage in an interactive process with an employee requesting an accommodation. Obviously, a more formal interactive process may be required if an employer and/or employee exclusively possess information necessary to identify an accommodation. This means that regardless of what is required, both parties can benefit if they are willing to place all their cards on the table in an effort to determine if a reasonable accommodation can be identified.

The Interpretive Guidance provides the following example to illustrate the informal interactive process.⁵³ A Sack Handler position requires an employee to lift and carry fifty pound sacks from a loading

49. *See id.*

50. *Id.*

51. *See Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996).

52. *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997).

53. *See* 29 C.F.R. pt. 1630 app. § 1630.9 (1997) (Process of Determining the Appropriate Reasonable Accommodation).

dock to a storage room. The sack handler requests a reasonable accommodation because he suffers from a back impairment. First, the employer analyzes the essential functions of the job, and determines that the essential function of the job is to move the sacks to the storage room. The employer then meets with the sack handler to ascertain precisely why the sack handler can't move the sacks to the storage room. The sack handler indicates that he can lift the sacks to waist level, but can't carry them. The employer and sack handler then agree that a number of potential accommodations exist, such as the provision of a dolly, hand truck, or cart, which would enable the sack handler to transport the sacks. Later it is determined that the cart is not a feasible option, but the dolly and hand truck are potentially effective options. The sack handler then indicates that he would prefer the dolly, and because the employer feels that the dolly would be more efficient, because it would allow the sack handler to move more sacks at a time, a dolly is ultimately provided.⁵⁴

In *Beck v. University of Wisconsin Board of Regents*,⁵⁵ Lorraine Beck suffered from osteoarthritis and depression. In 1991, Beck took a three-month medical leave from her secretary position with the University. When she returned, she was assigned to a new position where she was given a month to learn and practice a word processing program in her office.⁵⁶ Thereafter, she suffered from osteoarthritis aggravated by repetitive keyboarding. Beck's doctor recommended that she avoid repetitive keyboarding. A few months later Beck was hospitalized with severe depression and anxiety.⁵⁷ She returned to work on June 9, 1992, with a note from her doctor indicating that she may require some reasonable accommodation so that she would not have a recurrence of the condition. Beck's employer then sought to have her sign a release allowing the University to obtain further medical information from her doctor. She did not sign the release. Beck took medical leave again in July of 1992.⁵⁸ When she returned to work in August of 1992 she gave the University a letter from her doctor indicating that she may require assistance with her work load and an adjustable keyboard. The Assistant Dean then forwarded a memo to Beck indicating that the University needed more information in order to understand what accommodations needed to be made. In the meantime, Beck was temporarily moved to a new room and she began receiving her assignments from the Assistant Dean.⁵⁹ She was given a wrist rest, and the University claimed that her work load was re-

54. *See id.*

55. 75 F.3d 1130 (7th Cir. 1996).

56. *See id.* at 1132.

57. *See id.*

58. *See id.* at 1132-33.

59. *See id.* at 1133.

duced. Beck was not satisfied with the new assignment and complained that the new room was not properly ventilated. She took a third medical leave in September of 1992 and later filed a charge with the EEOC.⁶⁰

Though the Seventh Circuit stated that "[t]he employer has at least some responsibility in determining the necessary accommodation,"⁶¹ the court found that the employer did engage in an interactive process with Beck, but the University never knew what action needed to be taken because the process broke down when Beck failed to sign a medical release.⁶² With regard to making a determination related to who is responsible for the breakdown of the interactive process the court stated:

Neither the ADA nor the regulations assign responsibility for when the interactive process fails. No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.⁶³

An employee's failure to cooperate with an employer's request for medical information is often an indication to the court that an employee has acted in bad faith. In *Gerdes v. Swift-Eckrich, Inc.*,⁶⁴ a maintenance supervisor at a meat processing plant suffered from coronary artery disease. The worker underwent angioplasty in 1994 and was released to return to work with a lifelong forty-hour-a-week work restriction.⁶⁵ In response to an October 1994 request for a clarification of Gerdes' restrictions by the plant's Human Resource Manager, Gerdes' doctor wrote:

'As I indicated to you in a letter of September 16, 1994, I strongly encouraged [Gerdes] to continue working if possible; but at the same time, I very strongly urged him not to work more than forty hours a week . . . I consider this a life-long restriction. The only other activities I think Mr. Gerdes should refrain from are excessive lifting and exposure to hazardous work environments such as exhaust fumes, wide temperature variations, and other environmental hazards'.⁶⁶

After the Human Resource Manager consulted with the Plant Manager, a decision was made that, in light of Gerdes' restrictions and the fact that Gerdes could potentially be exposed to any of the various

60. *See id.*

61. *Id.* at 1135.

62. *See id.*

63. *Id.* at 1135.

64. 949 F. Supp. 1386 (N.D. Iowa 1996).

65. *See id.* at 1392-93.

66. *See id.* at 1393.

chemicals used in waste treatment and cleaning, that Gerdes could not return to work.⁶⁷ The only positions at the plant consistent with Gerdes' work restrictions were security guard and warehouseman positions, but none were available.⁶⁸

In early 1995, the Employee Benefits Coordinator for the plant requested a clarification from Gerdes' doctor, of Gerdes' ability to work within the plant environment. On April 3, 1995, Gerdes' doctor responded,

that Gerdes was restricted 'to a forty hour work week' and that he 'should refrain from exposure to extreme variations in temperature, exposure to noxious fumes such as ammonia, welding equipment, and other forms of noxious agents. Also, his work environment should be reasonably free of dust and other potentially harmful materials.'⁶⁹

On July 13, 1995 the plant's Human Resource Manager requested an update of Gerdes' medical condition and work restrictions. Gerdes' attorney responded that this information had been provided and would not be provided again.⁷⁰ In April of 1996, Gerdes' doctor responded to a letter requesting another clarification of Gerdes' work restrictions by stating that a forty hour a week work restriction was his main restriction. He further stated,

'[a]ll my recommendations regarding Mr. Gerdes's number of hours worked as well as exposure to other environmental hazards, have to be given a reasonable interpretation. I certainly think it is acceptable for him to work in the area of 40-45 hours, but I would not want him to work a 50, 60, or 70 hour work-week. . . . I am certainly aware that there is an occasional exposure to fumes and temperature variations working in a packing plant, and therefore my recommendation was that he should avoid prolonged, excessive or continuous exposure to these environmental hazards Regarding the lifting restriction. . . [m]y main concern is that he not be required to perform continuous or repetitive heavy lifting.'⁷¹

After receiving the doctor's letter, Gerdes was returned to work as a maintenance supervisor. The court cited *Beck* and stated that the breakdown of the interactive process plainly rested with Gerdes.⁷² The court noted that the employer made reasonable efforts to determine the appropriate accommodation by regularly requesting information about or clarification of Gerdes' work restrictions and that the requests either did not yield any response, or did not yield a response that clearly indicated it would be possible for Gerdes to return to work.⁷³ In *Beck* and *Gerdes*, employees were found to be responsible for the breakdown of the interactive process because they did not provide the employer with adequate medical information in order that

67. See *id.*

68. See *id.*

69. *Id.*

70. See *id.*

71. *Id.* at 1394.

72. See *id.* at 1405.

73. See *id.*

the employer could determine whether a reasonable accommodation could be provided. It seems clear that an employee who requests a reasonable accommodation pursuant to the ADA must be prepared to provide medical records and other relevant information if asked by his employer, or the employee is at risk of being found to have acted in bad faith.

The failure of an employee to cooperate with an employer when asked to provide medical information is not the only way an employee can fail to participate in the interactive process. Employees may be found to be just as well situated to investigate and suggest reasonable accommodations as the employer. In *Jacques v. Clean-Up Group, Inc.*,⁷⁴ Richard Jacques was employed as an all-purpose cleaning person. Jacques suffered from epilepsy and was not permitted to drive a motor vehicle. Jacques was able to travel to work by walking, riding a bicycle, or riding in one of the Group's vans prior to being laid off on February 19, 1994.⁷⁵ On February 24, 1994 the Group offered Jacques a position cleaning an ice arena approximately three miles from Jacques's home. Jacques was informed that the company van would not be provided to transport Jacques to and from work and that he would have to arrange for his own transportation. Jacques informed the Group that he could take a bus but could not arrive to work until sometime between 10:00 a.m. and 10:30 a.m. pursuant to the relevant bus schedule. The Group could not accommodate Jacques because the arena had to be completed at 9:30 a.m.⁷⁶ Subsequently, Jacques argued that the group failed to engage in an informal interactive process with him.⁷⁷

The First Circuit cited *Beck* and observed that "someone, either the employer or the employee, bears the ultimate responsibility for determining what specific actions must be taken by the employer."⁷⁸ The court in *Jacques* also cited *Taylor* and acknowledged that the *Taylor* court recognized that "[o]nce the accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer."⁷⁹ However, the *Jacques* court indicated that a jury could reasonably conclude that engaging in an interactive process simply was not necessary in order to determine the appropriate reasonable accommodation. In addition, the court opined that "[n]ot only was there substantial evidence from which to conclude that Jacques (an intelligent and well-educated indi-

74. 96 F.3d 506 (1st Cir. 1996).

75. *See id.* at 509.

76. *See id.* at 509-10.

77. *See id.*

78. *Id.* at 514 (citing *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996)).

79. *Id.* (citing *Taylor v. Principal Fin. Group*, 93 F.3d 155 (5th Cir. 1996)).

vidual who had always managed to make his own way to job sites in the past) was just as well situated, if not better so, to investigate and suggest other alternatives. . . .⁸⁰ These facts seem similar to the example offered by the ADA Interpretive Guidance, where an employer was able to accommodate an individual's request that his desk be placed on blocks in order for the arms of his wheelchair to fit under his desk.⁸¹ As stated previously, the ADA Interpretive Guidance suggests that in the case of the individual in the wheelchair, an appropriate accommodation was requested and identified without any reasonable accommodation process taking place.⁸² However, in *Jacques* no reasonable accommodation was identified. Maybe a better way of analyzing the court's ruling is to recognize that Jacques and the Group actually engaged in an interactive process when they discussed the fact that Jacques could not arrive until 10:00 a.m. and 10:30 a.m. and that under the circumstances the employer satisfied its duty to interact. In *Sieberns v. Wal-Mart*,⁸³ the district court agreed with the Seventh Circuit's recognition in *Beck* that the employer is required to engage in the interactive process. The court further explained: "[T]he law does not impose on the employer a duty to exhaustively investigate every possible option or type of accommodation, or to ensure that the potential employee is intimately involved in every effort the employer makes to find an accommodation."⁸⁴

This approach could justify the court's decision in *Jacques*. Regardless of whether the employer has a duty to interact, it seems clear that an employee can be found to have acted in bad faith during the interactive process if he does not actively investigate and attempt to suggest reasonable alternatives. Furthermore, it seems that the best approach for the employer is to treat the interactive process as a requirement. Even if the necessity to interact is a jury question, a jury could conclude that an employer who did not engage in an interactive process was required to interact.

Jacques seems to stand for the proposition that an employee who is intelligent and well educated may be considered to be well situated to investigate and suggest alternative accommodations. The Seventh Circuit discussed a similar issue in *Feliberty v. Kemper Corporation*.⁸⁵ In *Feliberty*, a physician who was employed by an insurance company and who suffered from carpal tunnel syndrome asked his employer to modify the arrangement of his computer and keyboard to accommo-

80. *Id.*

81. See 29 C.F.R. 1630 app. § 1630.9 (1997)(Interpretive Guidance on Title I of the Americans with Disabilities Act).

82. See *id.*

83. 946 F. Supp. 664 (N.D. Ind. 1996).

84. *Id.* at 670.

85. 98 F.3d 274 (7th Cir. 1996).

date his condition. A significant part of his duties involved the review of case files which the insurance company stored on computer.⁸⁶ The insurance company contended that the physician was solely responsible for defining a reasonable accommodation because his medical knowledge, combined with his knowledge of the requirements of his job, provided him with all of the information necessary to request a reasonable accommodation.⁸⁷ The court stated, "circumstances may exist where the employee has the laboring oar in identifying a reasonable accommodation; but an employer is not totally relieved of responsibility simply because its employee has unusual expertise."⁸⁸ It seems that an employee's intelligence level or expertise related to his job requirements and medical condition may limit the employer's duty to engage in an interactive process with the employee.

It should also be noted that an employer may have a more substantial duty to engage in an interactive process with an employee if that employee suffers from a mental illness. In *Bultemeyer v. Fort Wayne Community Schools*,⁸⁹ Robert Bultemeyer, a custodian for Fort Wayne Community Schools (FWCS) suffered from bipolar disorder, anxiety attacks, and paranoid schizophrenia. Bultemeyer took a series of disability leaves and subsequently was contacted on May 16, 1994, by the FWCS Employee Relations Director who wanted to know if Bultemeyer was ready to return to work at Northrop High School.⁹⁰ The Director also informed Bultemeyer that he would not receive any accommodations at Northrop, as he had at other schools where he had worked at the request of his psychiatrist. Previously, his duties had been limited to cleaning hallways, stairwells, locker rooms and the like, and not classrooms.⁹¹ In a letter dated May 17, 1994, the Director instructed Bultemeyer that he was to report to Northrop, and that if he did not, his employment would be terminated. After touring Northrop, Bultemeyer told the Director that he was not equal to the task of working at Northrop, but he was not resigning. Bultemeyer also refused to take a physical examination, required of all employees before returning to work, because he was afraid that if he passed, he would have to work at Northrop.⁹²

On May 24, 1994, the Director sent Bultemeyer a termination letter. A few hours later, Bultemeyer delivered a letter from his psychiatrist indicating that due to his illness it would be in his best interest to return to a school that might be less stressful than Northrop. How-

86. See *id.* at 276.

87. See *id.* at 280.

88. *Id.*

89. 100 F.3d 1281 (7th Cir. 1996).

90. See *id.* at 1281-82.

91. See *id.* at 1282.

92. See *id.*

ever, Bultemeyer was still terminated.⁹³ The Seventh Circuit found that material issues of fact existed regarding whether FWCS failed to engage in an interactive process with Bultemeyer. The court indicated that when an employee has a mental illness "the employer has to meet the employee half-way."⁹⁴ The court noted that FWCS made no inquiry about what Bultemeyer found stressful at Northrop, and did not inquire of Bultemeyer or his psychiatrist about what he needed to be able to work.⁹⁵ Furthermore, the court indicated that since FWCS had knowledge of Bultemeyer's mental condition it had some responsibility to ask Bultemeyer why he did not want to take the physical exam.⁹⁶

V. THE INTERACTIVE PROCESS AND EMPLOYER DEFENSES

Regardless of how individual courts have ruled regarding whether an employer is obligated to engage in an interactive process with its employee who has requested an accommodation, it is better to be safe than sorry. The best approach may be for all parties to treat the interactive process as a requirement that both parties do what is reasonable under the circumstances. The employer can benefit in a number of ways by engaging in an interactive process. By participating, an employer can avoid being found liable for violating the ADA for not interacting with an individual. Furthermore, an employer can gather information during the interactive process which will help identify whether the employer has an affirmative defense to an ADA claim.

Even if an accommodation seems reasonable, the employer does not have to implement the accommodation if it would cause the employer an "undue hardship."⁹⁷ This is defined as "an action requiring significant difficulty or expense, when considered in light of [certain] factors."⁹⁸ The following factors should be considered:

- (i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; and the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity; including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.⁹⁹

93. *See id.*

94. *Id.* at 1285.

95. *See id.*

96. *See id.* at 1286.

97. *See* 42 U.S.C. § 12112(b)(5)(A)(1994).

98. 42 U.S.C. § 12111(10)(A)(1994).

99. 42 U.S.C. § 12111(10)(B)(1994).

During the interactive process an employer has the opportunity to gather information that may be useful in evaluating the financial cost of an accommodation. Information gathered could be used to help determine the relevance of all aforementioned factors. Engaging in an interactive process is often a cost-effective way for an employer to make a preliminary evaluation whether an undue hardship would be suffered by implementing an accommodation.

An employer may also require as a standard for employment that an individual not pose a "direct threat" to the health or safety of himself or others.¹⁰⁰ The employer bears the burden of proving that a direct threat exists, and an individual who poses a direct threat will not be considered a qualified individual with a disability.¹⁰¹ The interpretive guidance defines "direct threat" as follows:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a direct threat shall be based on a reasonable medical judgement that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.¹⁰²

By interacting with an individual who requests an accommodation, an employer can ask for permission to review the individual's medical records and interact with the individual's medical care providers. There is no reason why an employer cannot make a preliminary evaluation regarding whether an individual poses a direct threat while engaging in an interactive process with that individual.

The relevance to an employer of determining whether an individual is a direct threat is clear. If a direct threat exists, the individual will not be considered a qualified individual with a disability.¹⁰³ The employer does not have to accommodate a person who is not a qualified individual with a disability pursuant to the ADA.¹⁰⁴ With this in mind, an employer can benefit from engaging in an interactive process that can result in gathering medical information because this information will help the employer make a determination regarding whether the individual is a qualified individual with a disability, even if the employer is not concerned with the possibility that the individual poses a direct threat.

It is clear that an employer can benefit from the interactive process in a number of ways. It is more difficult to prove a violation of the

100. See 29 C.F.R. § 1630.2(r) (1997).

101. See *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758 (5th Cir. 1996).

102. 29 C.F.R. § 1630.2(r)(1997).

103. See *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758 (5th Cir. 1996).

104. See 42 U.S.C. § 12112(b)(5)(A) (1994).

ADA when an employer has taken affirmative steps in order to make its own evaluation regarding whether the individual is a qualified individual with a disability and whether a reasonable accommodation can be provided. This can affect a plaintiff attorney's evaluation of a claim the first time he meets a potential client. An employer should be cognizant of the fact that engaging in an interactive process with an individual can prevent an employee from actively seeking legal counsel. Of course, the individual can still file a charge with the EEOC and/or any applicable state civil rights agency.

VI. CASE STUDY

This case study involves an individual who is subjected to restrictions as a result of a heart attack.¹⁰⁵ The individual presented his employer with written restrictions drafted by his doctor indicating that he could return to work in a month, but would be limited to a forty hour work week and had a twenty-five pound lifting restriction. A month later the employer's Human Resource Manager forwarded to the individual a letter which indicated as follows:

With the restrictions that your doctor has placed on you, you will not be able to perform the essential functions of your job of general labor. In order to return to work you must be able to perform the essential functions of your job without restrictions. As a result you will not be able to return to work with the restrictions from your doctor's note to the general labor position.¹⁰⁶

From the day the doctor's note was delivered to the employer, to the day the Human Resource Manager sent his letter, the employer did not interact with the individual. The employer did not review the individual's medical records or contact his doctor, even though the individual advised the employer that he would authorize the employer to do so a month prior to receiving the letter forwarded by the Human Resource Manager.

Under the ADA, disability is defined in one of three ways: "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."¹⁰⁷

In the instant case, there is a question whether the individual is disabled. The individual may not have an impairment which substantially limits a major life activity. Rather, the individual may just suffer from a garden variety medical condition. However, one could conclude that the Human Resource Manager regarded the individual as having such an impairment. It should also be noted that, the ADA

105. This case study involves a claim which was investigated by the author for potential violation of the ADA. The synopsis includes direct quotes from the correspondence the individual received from representatives of the employer.

106. See *supra* note 105.

107. 42 U.S.C. § 12102(2) (1994).

indicates that "the term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹⁰⁸ However, the Human Resource Manager wrote "in order to return to work you must be able to perform the essential functions of your job of general labor without restrictions."¹⁰⁹ This statement is contrary to the ADA. It seems as though he is saying the individual cannot return unless his disability is resolved. Also, there was no attempt made by the employer to engage in an interactive process with the individual. This is the type of letter which can motivate an attorney to pursue an individual's employment discrimination claim under the ADA.

VII. RECOMMENDATIONS AND CONCLUSION

Employers should consider the following recommendations. An employer should not wait for an individual to say the magic words, "I want an accommodation." Remember that *Taylor* indicates that an employer's knowledge of a disabled individual's limitations can arise if the limits are apparent to the employer. Also, it is clear that an employee need not mention the ADA or the term accommodation when making an accommodation request.¹¹⁰ Furthermore, an employer needs to be more perceptive when dealing with individuals suffering from mental illness or suspected of suffering from mental illness.¹¹¹ In situations where an individual may suffer from a mental illness, the employer should be sure to take affirmative steps to determine if an individual is interested in receiving an accommodation.

Employers should consider drafting job descriptions for all positions. The job descriptions should identify the essential functions and purpose of each position. The descriptions should be updated at least once a year. If an individual requests an accommodation, the employer should schedule a short meeting with the individual within seven days of the request. At the meeting, the employer should allow the individual to explain his disability, the reason an accommodation has been requested, and describe the specific limitations that exist as a result of his disability. The employer should request that the individual authorize the employer to request copies of the individual's medical records and speak to the individual's care providers. Of course, the employer should also request that the individual provide the employer with written restrictions from the individual's medical care provider.

108. 42 U.S.C. § 12111(8) (1994).

109. See *supra* note 105.

110. See *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994).

111. See *Bultemeyer v. Fort Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996).

The employer should also ask the individual's care provider to complete a "Medical Assessment of Ability to do Work-Related Activities Questionnaire."¹¹² Employers should be willing to pay an individual's care provider to complete this form. Generally, this will cost about one hundred dollars (\$100.00). The form should be drafted by the employer and be designed to evaluate an individual's ability to work for the employer. A typical form may ask for the following information: a) In an 8-hour day, how long can the individual sit, stand and walk without interruption? b) How much weight can the individual lift occasionally, frequently, and continuously? c) What limitations does the individual have with regard to simple grasping and fine finger movements? d) How much weight can the individual push occasionally, frequently, and continuously? e) Is the individual able to use his/her feet and legs for repetitive movements such as the operation of foot controls? f) How often can the individual: bend, twist, reach above shoulder level, squat, kneel, climb stairs, climb ladders, crouch, crawl, and stoop? g) Does the individual have any sensory limitations related to: feeling, vision, hearing, speaking and balance? h) Does the individual have any environmental restrictions related to: unprotected heights, moving machinery, temperature extremes, chemicals, dust, fumes, noise, automobiles, being outside in cold or wet weather, vibration, and humidity.¹¹³

If a psychological disability is being evaluated ask: a) Does the individual have limitations with regard to maintaining social functioning? b) Does the individual suffer from deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner? c) Does the individual experience episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms?¹¹⁴

An employer should ask the care provider to specifically explain all responses and identify the supportive medical findings related to all responses. After gathering as much information as possible, the employer should schedule another meeting with the individual to discuss the possibility of accommodating the individual. The employer should also freely provide the individual, and his or her care provider, with information regarding equipment and positions that may be considered for the individual. The object is to get all the cards on the table in a timely and cost efficient manner. Lastly, if the individual is represented by an attorney, the employer should continue moving forward as recommended and invite the individual's attorney to participate. However, the employer's human resource department should seek gui-

112. This form was created by the author as a guide for employers.

113. See *supra* note 112.

114. See *supra* note 112.

dance from its own attorney and not correspond directly with the individual's attorney. In fact, a prudent employer will have an attorney draft form letters which can be used to correspond with an individual and/or the individual's attorney during the interactive process.

The individual requesting an accommodation and/or the individual's representative should follow some basic guidelines in an effort to avoid being found responsible for the breakdown of the interactive process. The individual should speak to the care provider involved and request that the care provider draft specific, clear restrictions based on the individual's job duties, which can be presented to the employer. The employer should be asked to produce a job description that can be presented to the individual's care provider for review. Medical authorizations should be given to the employer immediately. The individual should ask the doctor involved to help recommend an accommodation. Most importantly, the individual should cooperate with the employer in an effort to help the employer ultimately provide an accommodation. As the cases have indicated, a lack of cooperation can be fatal. Furthermore, an individual should document his participation with the employer.

In conclusion, it is best to treat the interactive process as a requirement. It can be a cost effective tool for an employer which will help an employer evaluate if an individual is a 'qualified individual with a disability,' whether affirmative defenses apply, and whether a reasonable accommodation can be provided. For the individual requesting an accommodation the interactive process can be a forum where the individual can interact with the employer in an effort to determine if the employer will provide the individual with an accommodation. If all parties engage in an interactive process and lay all their cards on the table the process will result in accommodating those who are disabled more quickly and allow employers to weed out individuals who are not disabled or who cannot be reasonably accommodated. Obviously, this is cost efficient to an employer. It is best for all parties to play it safe by showing their hand as opposed to putting on their poker faces and waiting for the cards to be dealt in court.